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In The

Supreme Court of the United States

October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

vs

THE COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL JURY PROJECT AMICUS CURIAE IN SUPPORT OF PETITIONER

MOGILL, POSNER & COHEN
By: KENNETH M. MOGILL
Suite 1930
One Kennedy Square
Detroit, MI 48226
(313) 962-7210
Counsel of Record

NEAL BUSH
Suite 1816
One Kennedy Square
Detroit, MI 48226
(313) 962-1177

Attorneys for Amicus
National Jury Project

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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MOTION FOR LEAVE TO FILE BRIEF OF NATIONAL JURY PROJECT AS AMICUS CURIAE

Pursuant to Rule 37.4 of the rules of this Court, *amicus* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of Respondent's counsel to provide consent.

The National Jury Project [NJP] is a not-for-profit corporation established in 1975 for the purpose of studying all aspects of the American jury system and maintaining and strengthening that system. The NJP

maintains offices in Philadelphia, Pennsylvania, Minneapolis, Minnesota, and Oakland, California, providing consultative and educational services to attorneys and social science professionals in criminal and civil litigation in federal and state courts throughout the United States.

The National Jury Project has assisted attorneys in jury selection in thousands of civil and criminal trials. Many of these have been cases in which there has been extensive pre-trial publicity.

The NJP has authored three texts, *Jurywork: Systematic Techniques* (2d ed 1983), *Women's Self-Defense Cases: Theory and Practice* (1981) and *The Jury System: New Methods of Reducing Prejudice* (1975). Members of the NJP have written numerous articles for legal and social science journals and contributed to texts on subjects related to *voir dire* and the jury selection process. NJP members are frequent speakers at training seminars for criminal and civil trial lawyers throughout the United States, including, *inter alia*, seminars conducted by the American Bar Association, the Practicing Law Institute, the American Trial Lawyers Association and the National College of Criminal Defense.

NJP members have been invited to give testimony before Congressional committees and committees of numerous state legislatures. The NJP has conducted more than one hundred surveys of public opinion concerning criminal justice issues and analyzed the content and impact of pretrial publicity in hundreds of cases. Based on this research and experience, NJP members have submitted declarations and affidavits in numerous cases on issues of pretrial publicity, venue, jury composition, survey research, jury selection procedure, the use of peremptory challenges and strike procedures and have been qualified as expert witnesses in numerous federal and state courts. NJP research was cited with approval by the California Supreme Court in *People v Williams*, 29 Cal3d 392, 628 P2d 869 (1981).

From its members' studies of the relevant fields of social science and their extensive work and observations in individual cases, the National Jury Project has developed a broad understanding of how the conditions under which *voir dire* is conducted affect the behavior of prospective jurors.

Accordingly, *amicus* has a strong interest in the outcome of this case.

For the foregoing reasons, *amicus curiae* respectfully request that they be allowed to participate in this case by filing the annexed brief *amicus curiae*. *Amicus* are in the unique position to aid the Court in its consideration of the issues presented. The interests of *amicus* are direct and substantial. The participation of the *amicus* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear.

WHEREFORE, *amicus curiae* National Jury Project respectfully request that their motion for leave to file an *amicus curiae* brief in support of petitioner be granted.

Respectfully submitted,

MOGILL, POSNER & COHEN

By: KENNETH M. MOGILL
Suite 1930
One Kennedy Square
Detroit, MI 48226
(313) 962-7210
Counsel of Record

NEAL BUSH
Suite 1816
One Kennedy Square
Detroit, MI 48226
(313) 962-1177

Attorneys for Amicus
National Jury Project

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INTEREST OF THE AMICUS

The interest of *amicus curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

This Court and individual justices of this Court, lower courts and numerous commentators and social scientists have long noted the unreliability of prospective jurors' self-assessments of impartiality.

Voir dire is essentially an interview process conducted in an environment that is unfamiliar and foreboding to prospective jurors. Particularly in cases in which there has been extensive pretrial publicity, a substantial number of jurors are likely to be unaware of their own biases or unwilling to be open about them, particularly in a group setting. They are likely to feel internal and external pressure to conform their answers to what they believe to be socially acceptable responses.

Conditions of *voir dire* operate to inhibit or encourage candid responses from potential jurors. Closed-ended, conclusory questions posed to the group as a whole are far less likely to elicit information than are open-ended questions that encourage prospective jurors to describe their experiences, attitudes and opinions in their own words.

A trial court's reliance on prospective jurors' assertions of their own ability to set aside opinions as a basis for determining qualification to serve is an abdication of judicial responsibility for the reason that it relies on

jurors' own assessments of fairness without an independent judicial determination.

In a high publicity case, particularly in a case in which the jury may impose the death penalty, the mere posing of self-assessment questions is constitutionally inadequate. The Sixth and Fourteenth Amendments require that the scope of *voir dire* be broad enough to permit the court to identify and eliminate all biased jurors.

ARGUMENT

IN A HIGH PUBLICITY CASE, JURORS' SELF-ASSESSMENTS OF IMPARTIALITY ARE INHERENTLY UNRELIABLE, AND U S CONST, AM VI & XIV, REQUIRE THE TRIAL COURT TO EXPLORE ON *VOIR DIRE* THE SCOPE AND UNDERLYING BASIS OF PROSPECTIVE JURORS' KNOWLEDGE, ATTITUDES AND OPINIONS AS TO THE CASE IN ORDER TO DETERMINE FOR ITSELF PROSPECTIVE JURORS' IMPARTIALITY AND PERMIT COUNSEL TO MAKE A MEANINGFUL RECORD AS TO CHALLENGES FOR CAUSE.

Introduction.

The jury selection process is primarily an interview process. This and other courts and the social sciences have recognized that, in a high publicity case, many jurors come into the courtroom with biases and prejudices. Some of these biases result from what the jurors have read or seen in the media, others from discussions they have had in the community. If these biases go undetected, the accused's right to a fair jury trial is lost. Merely eliciting prospective jurors' affirmative responses

to questions asking whether they can set aside prejudicial opinions is an unreasonable reliance by the trial judge on jurors' self-assessments of fairness and an abdication of judicial responsibility.

A.

The law has long recognized the unreliability of jurors' assessments of their own impartiality in high publicity cases.

Long before modern social science began trying to quantify and analyze human behavior, Chief Justice Marshall, sitting as trial judge in *United States v Burr*, 25 Fed Cas 49 (case #14, 692g, 1807), noted the inherent danger of seating a prospective juror with preconceptions about the case to be tried. Foreshadowing the concerns of this and other courts about jurors' self-assessments of fairness, Marshall observed that protestations of neutrality are not to be trusted:

> Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion.

This Court and individual justices have subsequently expressed similar concerns about the reliability of jurors' self-assessments of fairness in high publicity cases. In *Irvin v Dowd*, 366 US 717 (1961), for example, the Court stated that, while "[i]t is sufficient if the juror can lay

aside his impression or opinion and render a verdict based on the evidence presented in court . . . [t]he adoption of such a rule . . . 'cannot foreclose inquiry as to whether, in a given case, the application of the rule works a deprivation of the prisoner's life or liberty without due process of law.' " *Id.* at 723 (cite omitted). Deeper probing is required for the reason that "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Id.* at 727.

As to individuals exposed to prejudicial publicity and asserting an ability to be fair despite pre-formed opinions, this Court continued:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellow is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.

See also *Murphy v Florida*, 421 US 794, 800 (1975) ("the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate . . . 'the presumption of partiality' "); *Sheppard v Maxwell*, 384 US 333, 351 (1966), citing *Irvin, supra*.

See also *Patton v Yount*, 467 US 1025, 1044 (1984) (Stevens and Brennan, JJ., dissenting) (noting that the record "suggests that some veniremen might have been tempted to understate their recollection of the case");[1]

---

[1] The extensive scope of *voir dire* in *Patton* stands in stark contrast with the total absence of probing in the case at bar. Cf. 467 US at 1033-1034.

Smith v Phillips, 455 US 209, 221-222 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased . . . is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."); *Nebraska Press Association v Stuart*, 427 US 539, 602 (1976) (Brennan, Stewart and Marshall, JJ., concurring); *United States v Dennis*, 339 US 162, 183 (1950) (Frankfurter, J., dissenting) ("Men ought not to be asked in effect whether they are brave or wholly indifferent to the enveloping atmosphere . . . nor should it be assumed that they are fully conscious of all the pressures that may move them.")

Numerous lower federal courts and individual judges have expressed the same or similar opinions. In *United States v Davis*, 583 F2d 190, 197 (5th Cir 1978), for example, the Fifth Circuit stressed that "[t]he juror is poorly placed to make a determination as to his own impartiality." The court also reiterated both its past criticism of "the trial court's asking the jury as a whole if anyone was exposed to publicity that would prevent him from impartially deciding the case" and its admonition that content questions should be asked and an independent determination as to partiality made by the trial court. Continuing, the court stated:

> "[T]his Circuit has determined that it is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed by any prejudicial publicity they may have been exposed to. Therefore, when there has been publicity that would possibly prejudice the defendant's case if it reached the jurors, the court should first ask the jurors what information they have received. Then it should ask about the

> prejudicial effect and it should make an independent determination whether the juror's impartiality was destroyed." 583 F2d at 197, citing *United States v Hyde*, 448 F2d 815, 848 (5th Cir 1971) at n 38.

The Seventh Circuit echoed a comparable sentiment in *United States v Dellinger*, 472 F2d 340, 367, 375 (7th Cir 1972):

> We do not believe that a prospective juror is so alert to his own prejudices. Thus it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause.
>
> Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial. The juror might well answer negatively and in good faith without stopping to consider the significance or firmness of impressions he might have gained from news reports.

See also *Coleman v Kemp*, 778 F2d 1487, 1541-1543 (11th Cir 1985); *McCoy v Goldston*, 652 F2d 654, 657 (6th Cir 1981); *United States v Ledee*, 549 F2d 990, 993 (5th Cir 1977); *United States v Bear Runner*, 502 F2d 908, 911-913 (8th Cir 1974); *United States v Silverthorne*, 400 F2d 627, 637-638 (9th Cir 1968); *Kiernan v Van Schaik*, 347 F2d 775, 779 (3d Cir 1965); *United States ex rel Bloeth v Denno*, 313 F2d 364, 372 (2d Cir 1963); *Delaney v United States*, 199 F2d 107, 112-113 (1st Cir 1952).

When *voir dire* questioning is successful at revealing bias, biased jurors are excused, and no jury selection issue comes to the attention of the appellate courts. The only examples that receive appellate notice, then, tend to be the most egregious ones. In nearly every instance in

which an appellate court has had to consider whether the *voir dire* in a case failed to protect the accused's right to a fair jury trial, the issue could have been avoided by an adequate *voir dire*.

In *Isaacs v Kemp*, 778 F2d 1482 (11th Cir 1985), for example, jurors were seated after what the court termed a "conclusory *voir dire*". A post-trial hearing later revealed that one juror had, in fact, sat through the trial of a co-defendant and had been exposed to the most damaging evidence against the defendant before trial began. The court attributed the problem to the conclusory nature of the *voir dire*. *Coleman, supra*, 778 F2d at 1543, n26, citing *Isaacs, supra*.

The highly publicized 1976 Massachusetts murder and bank robbery trial of Susan Saxe demonstrates that adequate *voir dire* can reveal the specific information, attitudes and opinions that may be hidden behind general assurances of impartiality. More than one-fourth of the 146 jurors excused for having already formed an opinion in that case had denied at least once that they had any opinion. Most striking, one prospective juror denied repeatedly that she had any opinion. She had read newspaper accounts about the case and "knew all about this naturally", but she repeatedly asserted that she could be fair, specifically denying any personal interest in the case or awareness of any bias or prejudice or inability to be impartial and repeatedly denying any opinion as to the defendant's guilt or innocence. When finally asked what she thought the defendant had done, however, the juror admitted, "Well, we all know what she has done . . .we all know the girl went in and held up the bank and the policeman was shot there." *Commonwealth v Saxe*,

Suffolk Cty Super Ct #51775-77 (1976), *voir dire* of juror #54, transcript reprinted in *Jurywork: Systematic Techniques* (2d ed 1983) at 10-46.1 -- 10-49.[2]

An October 30, 1979, letter from Hon. Prentice H. Marshall, United States District Judge for the Northern District of Illinois to Hon. Jim R. Carrigan, United States District Judge for the District of Colorado, further illustrates jurors' tendencies to overlook their own biases. Looking back at his experiences when he began permitting counsel to pose questions to prospective jurors, Judge Marshall wrote:

> Immediately Judge Norman's assertion was confirmed. A juror here and there who had assured me he or she could be fair and held no biases or prejudices admitted to a lawyer a profound bias, e.g. against police officers, black persons, etc. Then this fall the classic example occurred. I was presiding at a criminal case in which a labor union was a defendant. My inquiry addressed anti-union bias; virtually every prospective juror responded they had none and could be fair.
>
> The lawyer for the union . . . on supplemental examination elicited admissions of prejudice from *eleven* prospective jurors who were excused for cause. (emphasis in original; reprinted with permission)

[2] See also the *voir dire* in the highly publicized 1971 New Haven, Connecticut, trial of then-Black Panther Party leader Erica Huggins. One of the prospective jurors had consistently answered the judge's questions with assurances that she could be fair. When defense counsel was permitted to supplement the judge's questions, however, she stood directly behind the defendant and asked whether there was "anything about your attitudes or experiences . . . that would make you unable to . . . reach an unbiased verdict." The juror looked at Ms. Huggins and blurted out, "She's guilty!" *Connecticut v Huggins*, New Haven Super Ct #15681 (1971), reported in Ginger, "What Can Be Done to Minimize Racism in Jury Trials," 20 J Pub L 427, 437 (1971).

One commentator's review of *voir dire* transcripts in highly publicized cases has led to the identification of a "minimization effect" in jurors' responses. Bronson, "The Effectiveness of Voir Dire in Discovering Prejudice in High-Publicity Cases: An Archival Study of the Minimization Effect," presented at 25th Anniversary Meeting of Law and Society Assn, Madison, Wisconsin, June 8-11, 1989. When asked about knowledge about the case, jurors initially tend to preface their remarks with phrases such as, "I only glanced . . . ", "Nothing but . . . " or "Just what I saw in the papers . . . " Such comments are frequently followed by assurances that despite exposure to publicity or discussion, the juror has not formed any opinion. Bronson found that prospective jurors' initial denials of case knowledge or bias were often followed with answers revealing both. In one murder case, for example, a juror who had assured the judge that she knew nothing about the case later acknowledged that, through her work at the hospital where the autopsy on the deceased had been performed, she had developed such strong feelings that she could not be impartial. *Id.* at 41.

Other commentators have noted "jurors' tendency to exaggerate their self-reported ability to be impartial." 1978 Report of the American Bar Association Committee on Fair Trial and Free Press.

The combined tendency of jurors to minimize their exposure to publicity and to exaggerate their own assessments of their ability to be fair is most often not the result of juror fabrication or manipulation. Rather, it is the product of a number of factors that conspire to make the detection of bias extremely difficult. Perhaps most important among these is that *voir dire* is an encounter between lay people and the law.

The very language used in the courtroom is constrained by legal meanings not evident to lay persons untrained in the law. Scholars have explored the roadblocks to comprehension when jurors are instructed at the end of a trial, with considerable attention having been given to ways in which comprehension can be improved.[3] Less attention has been focused on comparable roadblocks that exist at the start of the trial. The prospective juror who simultaneously affirms that she can be fair while believing that "we all know what she has done", for example, is not lying; she does not understand the language of the courtroom or know that what she knows to be a fact is, in the eyes of the law, an unfair prejudgment. Such barriers at the beginning of the trial can

[3] Charrow and Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Columbia L Rev 1306 (1979); Strawn and Buchanan, "Jury Confusion: A Threat to Justice," 59 Judicature 478 (1976); Sales, Elwork and Alfini, *Making Jury Instructions Understandable* (1981); Severance and Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Instructions," 17 L and Soc Rev 153 (1982); Report of Comm on Juries of Judicial Council of Second Circuit (1984); Bermant et al., "Protracted Civil Trials: Views from the Bench and the Bar," Fed Judicial Ctr (1981).

undermine the entire system of trial by jury if reliance upon jurors' self-assessments of impartiality results in biased and unqualified jurors sitting in judgment of persons accused of crimes.

B.

The unreliability of jurors' self-assessments of fairness in high publicity cases is the product of *voir dire* conditions poorly designed to identify or eliminate juror biases.

The unreliability of jurors' self-assessments of fairness is not coincidental. Particularly in a high publicity case, it is the predictable result of the manner in which the process is carried out.

Voir dire is, first and foremost, an interview. As in any interview, the quality of the information obtained during *voir dire* is controlled by the conditions under which the *voir dire* is conducted, the type of information sought and the interviewee's perceptions of the end result of the interview. Extensive empirical research in social psychology has long recognized that attitudes and behavior are influenced by situational conditions and that the characteristics of a given setting often determine behavior more significantly than do the personality characteristics of the person in the setting. Mischel, *Personality and Assessment* (1968); Sarbin, "Contextualism: A World View for Modern Psychology," in Cole (ed), *Nebraska Symposium on Motivation* (1976).[4]

[4] These empirical research findings are confirmed by the observations of experts in jury behavior. Bennett, "Psychological Methods of Jury Selection in the Typical Criminal Case," 4

(Continued on following page)

To a prospective juror coming into a courtroom for the first time, the courtroom is an unfamiliar, formal place presided over by a robed authority figure talking in language far removed from the juror's everyday speech. The juror is seated in the open, surrounded by strangers, and he or she is asked long, often confusing questions about legal concepts he or she may never have considered. The juror is also aware that he or she will be included in or excluded from the jury based on the answers he or she gives to questions. How these circumstances affect the quality of information obtained has been the subject of substantial empirical research.

Most people aware of being evaluated become concerned about their performance, and this "evaluation apprehension" influences responses given. Rosenberg, "When Dissonance Fails: On Eliminating Evaluation Apprehension from Attitude Measurement," 1 J Personality and Soc Psychology 28 (1965). Awareness of the consequences of various responses can further affect the way attitudes and beliefs are expressed. Collins and Hoyt, "Personal Responsibility for Consequences: An Integration of the Forced Compliance Literature," 8 J Experimental Soc Psychology 558 (1972). People being evaluated are also susceptible to "social comparison

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(Continued from previous page)

Crim Def 11 (1977); Broeder, "Voir Dire Examinations: An Empirical Study," 38 S Cal L Rev 503 (1965); Frederick, *The Psychology of the American Jury* (1987); Smith and Malandro, *Courtroom Communication Strategies* (1988 supp); Starr and McCormick, *Jury Selection: An Attorney's Guide to Jury Law and Methods* (1985); Suggs and Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis," 56 Indiana L J 245 (1981).

information" – indications from others as to the appropriateness of their behavior, attitudes and feelings. Festinger, "A Theory of Social Comparison Processes," 7 Human Relations 117 (1954); Schacter, *The Psychology of Affiliation* (1959). Even without intending to do so, many people devote considerable attention to how they are received, and they adopt behaviors they believe will allow them to leave an embarrassing situation as quickly as possible. Arkin et al., "Social Anxiety, Self-Presentation and the Self-Serving Bias in Causal Attribution," 38 J Personality and Soc Psychology 23 (1980).

Most people seek naturally to present themselves in the best possible light – for example, portraying themselves as fair rather than unfair, honest rather than dishonest. In *voir dire*, the most socially desirable characteristics to display are fairness and impartiality. The typical *voir dire* encourages jurors to conform their behavior to the behavior of others, giving short answers tailored to what they perceive to be socially acceptable. Suggs and Sales, *supra*; Carroll, "Speaking the Truth: Voir Dire in the Capital Case," 3 Am J Trial Advocacy 199 (1979). The pressure jurors understandably feel to act the part of the good citizen who is fair and impartial interferes with their ability to be open and honest about prejudicial attitudes or opinions. Smith and Malandro, *supra*; Starr and McCormick, *supra*.

When the questioning of the jury panel is conducted by the judge, there are yet additional inhibiting factors at work unless the judge consciously works against them. The judge is the highest authority figure in the courtroom, and prospective jurors not only respect the judge, they wish to avoid appearing in an unfavorable light in

his or her eyes. They, therefore, take from the judge their verbal and non-verbal cues as to what behavior is expected and acceptable and tend, intentionally or otherwise to conform their answers to what they feel the judge wishes to hear.[5]

The natural human tendency to conform would not be problematic if jurors entered the courtroom as "blank slate". Jurors, however, bring into the courtroom a set of experiences and attitudes accumulated over a lifetime. Many of these are emotionally charged, and some are prejudicial and deeply held in ways that directly affect their ability to be impartial in a criminal case. Surveys of prospective jurors conducted throughout the country by the National Jury Project, for example, reveal that as many as fifty per cent of persons eligible for jury service

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[5] Cf., e.g., Note, "Judges' Non-verbal Behavior in Jury Trials: A Threat to Judicial Impartiality" 61 Va L Rev 1266 (1975); Suggs and Sales, *supra*. Greater candor in response to questions posed by lawyers is also attributed to lawyers asking more specific questions as a result of their greater knowledge of the case and to jurors' perceptions of lawyers as being biased on behalf of their clients. For the latter reason, lawyers' participation in the questioning implies a right to the participation of "biased" parties; therefore, "biased" answers become more socially acceptable than where the questions are posed by the judge. Cf., e.g., Padawer-Singer, Singer and Singer, "Voir Dire by Two Lawyers: An Essential Safeguard," 57 Judicature 386 (1974).

For reasons such as these, numerous commentators have argued for a right to attorney-conducted *voir dire*. Cf., e.g., Padawer-Singer et al., *supra*; Jones, "Judge-Versus-Attorney-Conducted Voir Dire," 11 L and Human Behavior 131 (1987). Virginia law allows attorneys directly to question prospective jurors. Virginia Code, sec 8.01-358.

would require a criminal defendant to prove his or her innocence despite a judge's instructions to the contrary. Nearly as many believe that if the prosecution has gone to the trouble of bringing a defendant to trial, he or she is probably guilty. *Jurywork: Systematic Techniques, supra*, sec 2.04[2][a] and studies cited therein; see especially figure 2.1. National surveys conducted by independent pollsters confirm these findings.[6]

In a highly publicized case, jurors may also bring "information" and opinions gleaned from the media, neighbors or relatives, including awareness of inadmissible evidence and/or sensationalized characterizations of the charged offense and the accused's alleged role in it.[7]

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[6] See National Center for State Courts, "The Public Image of the Courts: Highlights of a National Survey of the General Public, Judges, Lawyers and Community Leaders" (1978) at 6; Turner, "Tabulation of Attitude Data on Criminal Justice Issues from a National Survey," National Research Council-National Academy of Sciences (1979)[unpublished manuscript].

[7] Crime news tends to dominate local news coverage, Carroll et al., "Free Press and Fair Trial: The Role of Behavioral Research," 10 Law and Human Behavior 187, 190 (1986) and studies cited therein, and most of what is reported is obtained from police sources and presents the prosecution side of the case. *Id*. Persons who follow such news and recall details of what is reported are more likely than others to feel prosecution-oriented. They are, however, *"no less likely to feel they could hear the evidence with an open mind." Id*. (emphasis added); Constantini and King, "The Partial Juror: Correlates and Causes of Prejudgment," 15 L and Soc Rev 9 (1980).

See also Hvistendahl, "The Effect of Placement of Biasing Information," 56 Journalism Quarterly 863 (1979), citing a study by Columbia University Professor Alice Padawer-Singer

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Because there are both conscious and unconscious reasons why jurors are either unable or unwilling to recognize and reveal their own biases, *voir dire* questions must be designed to encourage jurors to express their opinions in their own words. The questions posed by the trial court in this case – "Is there . . . ?" "Would . . . ?" – appear calculated to achieve the *opposite* result; they are closed-ended, leading questions that inform prospective jurors the correct answer is "no" or which can easily be answered with no response at all. In contrast, the questions proposed by defense counsel – "What have you seen, read or heard about this case?" "What did you discuss?" "What is your opinion" – were open-ended. Had they been asked, these questions would have elicited the information necessary for the court and counsel to assess prospective jurors' ability to be fair in accordance with the legal principles applicable in a criminal case.

In addition, where, as a result of prejudicial pretrial publicity or for other reason, biased jurors are seated, the

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in which taped testimony from an actual murder trial was submitted to panels of juries drawn from regular jury pools. Prior to the mock trials, one half of the juries were presented with simulated news articles reporting that the accused had a prior criminal record and had made a confession he had later retracted. Eighty percent of the jurors exposed to the "news" accounts voted to convict while only 39% of the control group jurors would have found the defendant guilty.

See also Sue, Smith and Gilbert, "Biasing Effects of Pretrial Publicity on Judicial Decisions," 2 J Crim Justice 163 (1974); Sue, Smith and Pedroza, "Authoritarianism, Pretrial Publicity and Awareness of Bias in Jurors," 37 *Psychological Reports* 1299 (1975).

resulting prejudice to the accused cannot be eliminated through curative instructions. Carroll et al., *supra*, at 194-195 and studies cited therein; Strawn and Buchanan, *supra*. See also *Groppi v Wisconsin*, 400 US 505 (1975).[8]

For these reasons, prospective jurors' self-assessments of impartiality in high publicity cases are the understandably unreliable product of the normal conditions of *voir dire*.

C.

In a high publicity case, only a thorough and probing *voir dire* calculated to explore prospective jurors' sources and knowledge of the case can assure that biased jurors are identified and excused for cause.

The extent to which *voir dire* is successful in uncovering juror bias depends in large part on the willingness of trial judges and attorneys to recognize the relationship between the conditions of *voir dire* and their role in overcoming its shortcomings.

In order to identify and eliminate juror bias in high publicity cases, the Sixth and Fourteenth Amendments require far more than the conclusory questions asked here. At a minimum, *voir dire* questions in high publicity cases should address not only *whether* a juror has read or heard about the case but also the *sources* of his or her information and the *exact nature* of the information the

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[8] Consider also Justice Jackson's well-known admonition from his concurring opinion in *Krulewitch v United States*, 336 US 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

juror possesses. The details of prospective jurors' exposure to prejudicial pretrial publicity and/or other extra-evidentiary sources of information must be probed sufficiently to permit fair determination by the court of challenges for cause and provide an appropriate opportunity for counsel to make a record for appeal.[9]

In addition, the right to a fair jury trial demands that *voir dire* be conducted in a manner that will encourage candid answers from prospective jurors, thus allowing the trial judge to make an informed and independent determination as to each juror's ability to be fair and impartial. Questions posed to prospective jurors about their attitudes should be open-ended. The questions posed as to the sources, nature, and extent of jurors' knowledge of extra-evidentiary material, for example, should be phrased, "What have you read or heard?" "Where did you hear or read about this?" The court should also be careful to follow-up with jurors who say they only know what they "have read in the paper" and be sensitive to the desires of jurors to minimize their responses, whether for reasons of nervousness in a public speaking situation or not wishing to appear biased. Only

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[9] Concerns about time may be alleviated by requiring counsel to submit proposed questions to the court prior to the beginning of trial and by the submission of a supplemental written questionnaire to prospective jurors in advance of trial. Submission of such questionnaires in advance of trial is becoming an increasingly accepted information-gathering and time-saving practice in state and federal courts throughout the country. For a partial list of cases in which this procedure has been utilized, see *Jurywork: Systematic Techniques, supra*, figure 2.6.

by allowing prospective jurors to use their own words to describe the information sought can the court be assured of distinguishing between jurors who have formed prejudgments and those who have not.[10]

The case at bar was a highly publicized case in which there was a high probability of prejudice. The failure to conduct *voir dire* in a manner capable of identifying or eliminating biased jurors violated the Petitioner's Sixth and Fourteenth Amendment rights by failing to assure him a trial by a fair and impartial jury. Particularly where

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[10] Other ways in which the conduct of *voir dire* can be improved to encourage juror candor include:

The nature of the proceedings to follow and the jurors' role in them should be explained to jurors in words they can understand.

In all cases, jurors should be examined individually or in small groups. Individual, sequestered *voir dire* is recommended in high publicity cases. Cf., e.g., *United States v Giacalone*, 588 F2d 1158, 1162 (6th Cir 1978); *United States v Starks*, 515 F2d 112, 125 (3d Cir 1975); *United States v Bryant*, 471 F2d 1040, 1044-1045 (DC Cir 1972); American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, sec 3.4(a).

The questioner should convey his or her own openness and interest in what the juror is saying. Follow-up questions, where called for, should acknowledge the emotional content of the juror's answer as well as its substance, and they should be based on both the substance and emotional content of that answer.

Finally, the interview should be conducted in a manner that conveys to prospective jurors the court's acceptance of whatever answers are given; that is, that there are no "right" or "wrong" answers so long as the answers given are candid and honest.

the jury selected as a result of such a severely truncated procedure determines not only guilt or innocence but also whether the defendant is to live or die, such a failure requires that the resulting judgment be set aside. Cf. *Turner v Murray*, 476 US 28 (1986).

RELIEF REQUESTED

For all the reasons stated above, *Amicus* National Jury Project requests that the judgment of the Supreme Court of Virginia be reversed.

Respectfully submitted,

MOGILL, POSNER & COHEN

/s/ Kenneth M. Mogill
By: KENNETH M. MOGILL
Suite 1930
One Kennedy Square
Detroit, MI 48226
(313) 962-7210
Counsel of Record

/s/ Neal Bush
NEAL BUSH
Suite 1816
One Kennedy Square
Detroit, MI 48226
(313) 962-1177

Attorneys for Amicus
National Jury Project

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